UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH [REDACTED]@GMAIL.COM AND [REDACTED]	Case No. 18-sc-4 Chief Judge Beryl A. Howell

NOTICE

On January 3, 2018, the United States government, acting through Special Counsel Robert S. Mueller, III, obtained a warrant, pursuant to 18 U.S.C. § 2703 and Federal Rule of Criminal Procedure 41, to access the content of two emails accounts. The email provider complied with that warrant. A government Filter Team, assigned to review the disclosed communications for privileged materials, discovered several emails between the account holder and the account holder's attorney. On April 25, 2018, the Filter Team filed a motion for authorization to provide the Special Counsel's Investigative Team with the email communications between the account holder and the attorney. On April 27, 2018, the Court granted that motion and issued a memorandum opinion explaining the basis for the order.

That memorandum opinion references "matter[s] occurring before the grand jury" and thus was docketed under seal because courts are required, under Federal Rules of Criminal Procedure 6(e)(5) and (6), respectively, to "close any hearing" and keep under seal "[r]ecords, orders, and subpoenas related to grand-jury proceedings." Yet, the obligation to seal records continues only "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." FED. R. CRIM. P. 6(e)(6); *see also* FED. R. CRIM. P. 6(e)(5) ("[T]he court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury."). The D.C. Circuit has instructed, for ancillary proceedings arising from a grand jury investigation, that "if the Chief Judge can allow some public access

without risking disclosure of grand jury matters—either because the subject of the proceeding removes the danger or because the proceedings may be structured to prevent the risk without disruption or delay—Rule 6(e)(5) contemplates that this shall be done," noting that "the Federal Rules of Criminal Procedure confer this authority on district courts." *In re Motions of Dow Jones & Co.*, 142 F.3d 496, 502 (D.C. Cir. 1998). Consistent with this authority, judicial decisions and orders entered in such ancillary proceedings "may be made public by the court on its own motion . . . upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." D.D.C. LCrR 6.1.

The Special Counsel's report is now complete and has been partially released to the public. Accordingly, on April 17, 2019, the Court ordered the government to identify which parts of the Court's April 27, 2018 Memorandum Opinion may be unsealed. *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1138, 1140 (D.C. Cir. 2006) ("Our case law, moreover, reflects the common-sense proposition that secrecy is no longer 'necessary' when the contents of grand jury matters have become public."). On May 17, 2019, the government identified some portions of the Court's memorandum opinion to be unsealed but asked that "the Court redact factual information that, if made public, would unduly infringe personal privacy or could harm an ongoing investigation." *See* Gov't's Status Report, ECF No. 22.

Upon consideration of the government's status report, notice is hereby provided that this Notice and a redacted copy of the April 27, 2018 Memorandum Opinion, attached hereto, will be made publicly available on the Court's website.

Date: May 22, 2019

BERYL A. HOWELL
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE SEARCH OF INFORMATION ASSOCIATED WITH [redacted]@GMAIL.COM AND [redacted]	Case No. 18-sc-00004 (BAH) Chief Judge Beryl A. Howell **FILED UNDER SEAL and *EX PARTE***

MEMORANDUM OPINION

The Special Counsel's Office ("SCO") has obtained, pursuant to a search warrant issued on January 3, 2018, under 18 U.S.C. § 2703 and Federal Rule of Criminal Procedure 41, ECF No. 5, electronic communications from two email accounts "[redacted]." SCO's App. Search Warrant, Attach. A, FBI's Aff. Supp. App. Search Warrant ("FBI's Aff.") ¶ 1, ECF No. 1-1. In the course of reviewing these email communications, a Filter Team assigned to review electronic communications for privileged materials and to prevent the SCO's Investigative Team from accessing such materials discovered several emails between [redacted] and his attorney regarding the attorney's conveyance [redacted]." Filter Team's Second *Ex Parte, In Camera* Mot. Seeking Auth. Rev. Commc'ns Between [redacted] & Att'y ("Filter Team's 2d Mot.") at 4, ECF No. 16; *see also generally id.*, Ex. 1, Subj. Email Commc'ns, ECF No. 16-1.[1] The Filter Team now seeks an order that these emails "are neither privileged nor otherwise protected such that the investigative team . . . may utilize them in the [SCO]'s investigation." Mot. Leave File Docs. Under Seal, Ex. 1, Proposed Order at 1, ECF No. 14-1. For the reasons that follow, the Filter Team's motion is granted.

[1] [redacted].

I. BACKGROUND

The relevant investigative and procedural background is laid out below.

A. [redacted]

[redacted]

[2] [redacted]

[redacted]

B. The SCO's Search and Seizure of Information Associated with [redacted] Email Addresses

On January 3, 2018, the SCO applied, pursuant to 18 U.S.C. § 2703(a) and Rule 41 of the Federal Rules of Criminal Procedure, for a warrant to search and/or seize information associated with two email accounts [redacted] and maintained and controlled by Google, Inc.[3] *See* SCO's App. Search Warrant, ECF No. 1. The SCO submitted a 48-page affidavit, including attachments and exhibits, in support of its application, providing probable cause to believe [redacted]. The Court issued the search and seizure warrant, predicated on the SCO's showing of probable cause, the same day. *See* Minute Entry, dated Jan. 3, 2018. The warrant was executed that day and returned on January 11, 2018. *See* Returned Warrant, ECF No. 5.

C. The Filter Team's Review of [redacted] Email Communications

Rule 4.4 of the District of Columbia Rules of Professional Conduct prohibits an attorney from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of [ ] a person," including by infringing on the attorney-client relationship. D.C. R. Prof. Conduct

[3] The email accounts in question are [redacted]@gmail.com and [redacted].

4.4(a). To ensure that information produced in response to legal process is "collected in a manner consistent with professional responsibility requirements concerning the maintenance of privilege," the SCO has used a "Filter Team," which "segregate[s] from the Investigation Team information potentially subject to the spousal privilege, attorney-client privilege or the attorney work product doctrine contained within [a] Subject Account." Filter Team's Crime-Fraud Mot. at 3. The SCO has implemented a protocol requiring the Filter Team to withhold from investigators "all material potentially subject to the crime-fraud exception to the attorney-client privilege . . . unless disclosure is with the consent of the privilege holder, or with a court's approval." *Id.*

In the course of reviewing information Google produced pursuant to the warrant to search and seize information associated with [redacted] email addresses, the Filter Team identified certain emails between [redacted] and his attorney. *Id.* The Filter Team concluded that the communications appeared to involve [redacted]

[4] Both motions concern the same set of emails. *See generally* Filter Team's Crime-Fraud Mot., Ex. 1, Subj. Email Commc'ns, ECF No. 8-2; Filter Team's 2d Mot., Ex. 1, Subj. Email Commc'ns, ECF No. 16-1.

[redacted]

[redacted]

[redacted]

[redacted]

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5 [redacted].

6 [redacted]

[redacted]

D. The Filter Team's *Ex Parte*, *In Camera* Motions

On March 30, 2018, the Filter Team filed, under seal, its first *ex parte*, *in camera* motion seeking authorization to review the same email communications at issue here between [redacted] and his attorney, which the Filter Team asserted "are subject to the crime-fraud exception to the attorney-client privilege." Filter Team's Crime-Fraud Mot. at 1. The Filter Team acknowledged that the email communications in its possession "do not appear to contain all of the relevant communications between [redacted] and [the attorney]." *Id.* at 5. Nonetheless, the Filter Team asserted that, "[t]aken together, [ ] the emails strongly suggest that [redacted] directed his attorney [redacted]

On April 2, 2018, the Court ordered the Filter Team to "supplement its motion with additional briefing on the following four discrete issues to facilitate resolution of the instant motion": (1) whether the inclusion of two associates of [redacted] on the emails in question prevented the attorney-client privilege's attachment; (2) what legal basis existed for the assertion that [redacted] conduct constituted a crime or fraud [redacted]; (3) [redacted]

[redacted]; and (4) whether the [redacted] relied on [redacted] allegedly false representations, and if not, whether the crime-fraud exception required a showing of any such reliance. Order to Suppl. at 1–2, ECF No. 9. The Filter Team moved, under seal, to withdraw its motion without prejudice four days later, *see generally* Filter Team's Mot. Withdraw, ECF No. 11, which motion the Court granted, Order Granting Mot. Withdraw, ECF No. 12.

On April 24, 2018, the Filter Team submitted a second motion, again under seal, seeking authorization to review communications between [redacted] and the attorney. *See generally* Filter Team's 2d Mot. This time, the Filter Team did not argue that the crime-fraud exception to the attorney-client privilege applied. *See id.* at 9–13. Instead, the Filter Team argued that the emails were "not privileged" in the first place "[b]ecause [redacted] appears to have conveyed the information about [redacted] to [the attorney] with the understanding that it be disclosed to [redacted]." *Id.* at 9–10. The Filter Team once again attached the emails at issue to the motion. *See generally* Subj. Email Commc'ns.

II. DISCUSSION

The Filter Team argues that the attorney-client privilege does not protect the emails at issue because the emails' contents never were intended to be confidential, but rather were intended to be conveyed to the [redacted]. The Filter team argues in the alternative that the attorney waived any privilege that initially attached by disclosing the emails' substance to the [redacted]. The scope of the attorney-client privilege is discussed first, followed by an analysis of the privilege's applicability to the emails at issue. The

attorney-client privilege, though broad, "is not absolute." *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (citing *Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981)). The privilege does not attach to communications intended to be shared with third parties rather than to be kept confidential. Moreover, even when the privilege initially attaches, third-party disclosure of a privileged communication's substance waives the privilege as to that communication. Here, [redacted] communicated to his attorney information regarding his [redacted] with the understanding that the attorney would serve as a conduit of that information to [redacted]. As such, the emails at issue were never confidential, and thus, never privileged. In the alternative, even assuming the privilege initially applied, the attorney waived the privilege by discussing the emails' contents with the [redacted]. Thus, whether under a conduit or waiver theory, the attorney-client privilege does not protect the emails at issue and the Filter Team may review and share with the Investigative Team the emails' contents.

A. SCOPE OF THE ATTORNEY-CLIENT PRIVILEGE

"The attorney-client privilege 'is the oldest of the privileges for confidential communications known to the common law,'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169 (2011) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)), and applies to "confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client," *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014); *see also In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) ("[T]he privilege applies only if the person to whom the communication was made is 'a member of the bar of a court' who 'in connection with th[e] communication is acting as a lawyer' and the communication was made 'for the purpose of securing primarily either (i) an

opinion on law or (ii) legal services or (iii) assistance in some legal proceeding.'" (quoting *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C. Cir. 1984))).

Critical for the attorney-client privilege to attach is that the attorney-client communications are "confidential," *In re Kellogg Brown & Root*, 756 F.3d at 757, a category including "communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended." *In re Grand Jury Proceedings*, 727 F.2d 1352, 1355–56 (4th Cir. 1984) (quoting MCCORMICK ON EVIDENCE § 91 at 187–88 (Cleary ed. 1972)). In contrast, "courts have consistently 'refused to apply the privilege to information that the client intends his attorney to impart to others,' or which the client intends shall be published or made known to others." *Id.* at 1356 (alteration omitted) (quoting *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976)); *see also United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("When information is disclosed for the purpose of assembly into a bankruptcy petition and supporting schedules, there is no intent for the information to be held in confidence because the information is to be disclosed on documents publicly filed with the bankruptcy court."); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) ("When information is transmitted to an attorney with the intent that the information will be transmitted to a third party (in this case on a tax return), such information is not confidential."); *Esposito v. United States*, 436 F.2d 603, 606 (9th Cir. 1970) ("While it is true that an attorney cannot waive the privilege, in this case it is clear that the statements and advice expressed . . . were not confidential. It is obvious that these remarks would be repeated to the Court the next day."); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) ("[A] good deal of information transmitted to an attorney by a client is not intended to be confidential, but rather is given for transmittal by the attorney to others . . . . Such information

is, of course, not privileged."); *United States v. Tellier*, 255 F.2d 441, 447 (2d Cir. 1958) ("[I]t is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others."); *Wilcoxon v. United States*, 231 F.2d 384, 386 (10th Cir. 1956) ("[A] statement or communication made by a client to his attorney with the intent and purpose that it be communicated to others is not privileged."); *United States v. Naegele*, 468 F. Supp. 2d 165, 170 (D.D.C. 2007) ("[I]nformation and communications imparted from a client to his attorney *for the purpose of their disclosure* . . . are not privileged because information intended to be disclosed . . . by definition is not information provided to the attorney in confidence." (emphasis in original)); *United States v. Shibley*, 112 F. Supp. 734, 742 (S.D. Cal. 1953) ("[I]f a person employs an attorney with the understanding that certain information be transmitted to a third party for the purpose of securing a benefit to the client, and the attorney communicates such information, then not only the specific information, but the more detailed circumstances relating to it may be gone into. . . . [W]hen the client and attorney themselves, for purposes beneficial to the client, lift the veil, they cannot lower it again.").

Thus, "if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as the details underlying the data which was to be published will not enjoy the privilege." *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984) (internal quotation marks omitted); *see also In re Grand Jury Proceedings*, 727 F.2d at 1356 ("[D]isclosure of 'any significant part of a communication waives the privilege' and requires the attorney to disclose 'the details underlying the data which was to be published.'" (some internal quotation marks omitted) (quoting *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972))); *White*, 950 F.2d at 430 ("[D]isclosure . . . effectively waives the

privilege not only to the transmitted data but also as to the details underlying that information." (internal quotation marks omitted) (quoting *Lawless*, 709 F.2d at 488)).

As the Fourth Circuit has recognized, "how to determine when a client intends or assumes that his communication will remain confidential" is a "difficult question," for "a layman does not expect his attorney to routinely reveal all that his client tells him." *(Under Seal)*, 748 F.2d at 875. This assessment requires "look[ing] to the services which the attorney has been employed to provide and determine if those services would reasonably be expected to entail the publication of the clients' communications." *Id.* Although *(Under Seal)*, a Fourth Circuit case, is not binding, the D.C. Circuit has cited it with approval. *See In re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989). Indeed, in *In re Sealed Case*, the D.C. Circuit recognized that "data that [a client] intends to report" to a third party "is never privileged in the first place," *id.* at 979 n.4, as "the privilege is said not to attach to information which the [client] intends his attorney to report," *id.* at 978 (internal quotation marks omitted). *In re Sealed Case* addressed specifically the context of information an attorney reports "in the contents of a tax return," *id.* at 978–79, but this reasoning applies more broadly, including to information that a client intends the attorney to relay in an administrative proceeding.

Even if the attorney-client privilege initially attaches to a communication, the client may waive the privilege by disclosing the communication to a third party. *See id.* at 979 (recognizing the difference between "waiver of an existing privilege and absence of an intent to maintain confidentiality in the first place"). The D.C. Circuit "adheres to a strict rule on waiver of [the] privilege[ ]," requiring a privilege holder to "zealously protect the privileged materials" and "tak[e] all reasonable steps to prevent their disclosure." *SEC v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (citing *In re Sealed Case*, 877 F.2d at 980). "Any voluntary disclosure by the holder

of such a privilege is inconsistent with the confidential relationship," *Permian*, 665 F.2d at 1219, and as such, "will waive the privilege," *In re Sealed Case*, 877 F.2d at 980. A client waives the privilege by either "releasing documents" or "disclos[ing] the substance of privileged documents" to "an investigative body." *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989); *see also In re Subpoenas Duces Tecum*, 738 F.2d at 1370 (concluding that a client waives the privilege entirely as to all "material that has been disclosed to [a] federal agency"); *Permian*, 665 F.2d at 1219 (concluding that a client "destroy[s] the confidential status of . . . communications by permitting their disclosure to the SEC staff").

Waiver of the attorney-client privilege "extends to all other communications relating to the same subject matter." *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) (internal quotation marks omitted); *see also Williams & Connolly v. SEC*, 662 F.3d 1240, 1244 (D.C. Cir. 2011) ("[I]f a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality—and thus the attorney client privilege—for the rest of that conversation *and* for any conversations related to the same subject matter." (emphasis in original)); *In re Sealed Case*, 877 F.2d at 980–81 ("[W]aiver of the privilege in an attorney-client communication extends 'to all other communications relating to the same subject matter.'" (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982))).

B. ANALYSIS

The email communications at issue between [redacted] his associates, and the attorney concern information—[redacted]—that [redacted] provided to the attorney with the expectation that the attorney would relay the information to the [redacted]. These communications thus are not confidential as required to be subject

to the attorney-client privilege.[7] Alternatively, even if the privilege did initially attach to the emails, the attorney waived the privilege by conveying this information to [redacted]. As such, whether under a conduit or waiver theory, the attorney-client privilege does not protect the emails in question, and the Filter Team may review and share their contents with the SCO's Investigative Team.

1. The Privilege Never Attached to the Emails

The Filter Team argues that the attorney-client privilege does not cover the emails in question because the emails were not confidential, as [redacted] provided to the attorney information about [redacted] for the purpose of relaying that information to [redacted] on [redacted] behalf. Filter Team's 2d Mot. at 9. The attorney's March 13, 2017, email to [redacted] stated: [redacted] Subj. Email Commc'ns, Threat 2, at 5. An associate of [redacted] sent [redacted] and the attorney an email [redacted] On April 10, 2017, the attorney sent [redacted] [redacted]. The attorney followed up fifteen days later, informing [redacted] that [redacted]

[7] To be clear, as the Filter Team explains, the inclusion of two [redacted] associates, [redacted] on the emails at issue does not "necessarily vitiate[ ] the attorney-client privilege, to the extent the communications could be construed as privileged," Filter Team's 2d Mot. at 11, since [redacted]

Taken together, these emails show that [redacted] communicated with the attorney about his [redacted] "with the understanding," indeed, the design, that the attorney would "reveal[ ]," *(Under Seal)*, 748 F.2d at 875, this information [redacted]. Notably, while the emails' contents suggest that the attorney did ultimately relay to the [redacted] the fact of [redacted], the attorney need not actually have done so at all for the privilege to be inapplicable—what matters is merely that [redacted] *intended* the attorney to have relayed this information to a third party. *See In re Sealed Case*, 877 F.2d at 979 ("[T]he privilege is said not to attach to information which the [client] *intends* his attorney to report." (emphasis added; internal quotation marks omitted)). Under these circumstances, there can be no doubt that "the services which the attorney has been employed" by [redacted] "to provide . . . would reasonably be expected to entail the publication of the clients' communications." *(Under Seal)*, 748 F.2d at 875. The emails thus were not "confidential," a necessary prerequisite to the attorney-client privilege's application, *In re Kellogg Brown & Root*, 756 F.3d at 757; *In re Grand Jury Proceedings*, 727 F.2d at 1355–56; and so were "never privileged in the first place," *In re Sealed Case*, 877 F.2d at 979 n.4.[8]

2. The Privilege Was Waived as to the Emails at Issue

Alternatively, even if the attorney-client privilege initially attached to communications between [redacted] and the attorney regarding [redacted] and the attorney waived the privilege by disclosing the substance of those communications to [redacted]

[8] The Filter Team also argues that "[t]he dialogue between [redacted] and [the attorney] . . . appears to not have been for the primary purpose of securing a legal opinion, legal services, or assistance in a legal proceeding and therefore is outside the scope of the attorney-client privilege altogether." Filter Team's 2d Mot. at 12. This is a stretch too far since [redacted] use of the attorney's services [redacted] constitutes use of an attorney-client relationship to secure "legal services" and/or "assistance in some legal proceeding." *In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007).

[redacted]. The emails show that the attorney communicated with the [redacted] at least three times concerning [redacted], thus "disclos[ing] the substance of privileged [communications]" to "an investigative body." *White*, 887 F.2d at 271. The attorney's February 16, 2017, email to [redacted] referenced a [redacted] Email Commc'ns, Threat 1, at 2. On March 13, 2017, the attorney emailed [redacted] *Id.*, Thread 2, at 5. This email suggests that the attorney had further contact with [redacted] regarding [redacted], in which [redacted] made the document request anticipated in the attorney's earlier email. A third communication between the attorney and [redacted] subsequently occurred; as the attorney recounted to [redacted] in an email dated April 25, 2017, [redacted] *Id.*, Thread 4, at 13. The record thus shows that on at least three occasions, the attorney "disclosed the substance," *White*, 887 F.2d at 271, of what might otherwise have been privileged emails regarding [redacted], which information was then recounted [redacted], thus waiving the privilege as to that information in those emails.

"Under the law of this circuit," a client need not "releas[e] [actual] documents" themselves to waive the privilege; rather, the privilege will be waived by "disclos[ing] the substance of privileged documents." *Id.* Although the record is limited, the emails at issue expressly make clear that the attorney provided "our story," Subj. Email Commc'ns, Thread 1, at

2, [redacted] and, further, that the attorney assured [redacted] that [redacted]. The attorney's communications with [redacted] thus waived the privilege as to the attorney's communications with [redacted] on the subject of the promised letter. Consequently, assuming the privilege initially attached to the email communications at issue, the privilege was waived by the attorney's conferrals with [redacted] relaying [redacted] "story" regarding [redacted].

III. CONCLUSION

For the foregoing reasons, the Filter Team's second motion is granted. The attorney-client privilege does not protect the email communications at issue, and the Filter Team may review and share with the SCO's Investigative Team the emails' contents. An appropriate Order accompanies this Memorandum Opinion.

Date: April 27, 2018

BERYL A. HOWELL
Chief Judge